

There's No Place Like Home: Housing For the Most Vulnerable Individuals with Severe Mental Disabilities

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Individuals with severe mental disabilities have difficulty obtaining safe and affordable housing despite Congressional efforts to eradicate disability discrimination. This note examines the barriers that exist in private housing, public housing, and housing operated by mental health service providers that leave some individuals with mental disabilities with no place to live. To address the housing crisis, the author recommends recognizing the connection between poverty and disability, developing supportive housing for homeless individuals with mental disabilities, and redefining "disability" and "equality" in the context of housing.

I. INTRODUCTION

Consider two hypothetical individuals¹ with schizophrenia,² a severe and persistent mental disorder:

A is diagnosed with schizophrenia, but she receives treatment at a community mental health center where she receives psychotropic medications to control her symptoms. She is generally compliant with her medications. Occasionally she experiences increased symptoms, but she is monitored regularly by a mental health worker who is able to link *A* with appropriate psychiatric emergency services whenever necessary. She maintains her own apartment and works part-time at an agency that provides peer support to other mental health consumers. *A* also maintains close contact with family members.

B is also diagnosed with schizophrenia. She has had intermittent contact with various mental health workers, but she has not sustained an ongoing relationship. Her symptoms include paranoia that greatly inhibits her ability to form relationships. She is frequently observed talking to herself, and her gestures are perceived to be threatening by others. As a result, she has been evicted repeatedly and is homeless. Her disability checks have been discontinued because she missed a notice sent to her former address by the Social Security Administration. She has been convicted several times for shoplifting, to which

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¹ These are composites of individuals with whom I became acquainted while employed as a social worker at a community mental health center.

² Symptoms of schizophrenia may include delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, flat affect, poverty of speech and avolition. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274-77 (4th ed. 1994) [hereinafter DSM-IV].

she has resorted when she is unable to get to a food pantry. In an attempt to self-medicate and quiet auditory hallucinations, she has become addicted to illegal drugs. B's family has been unable to locate her for several years.

Individuals diagnosed with schizophrenia or other severe mental disabilities³ vary greatly in their ability to obtain and maintain housing, one of our most basic needs,⁴ yet obtaining housing is an obstacle that the most severely mentally disabled people frequently cannot overcome. For the most disabled, the efforts of Congress to eradicate discrimination in housing have not done enough. Following a brief overview of mental health and disability policies that impact housing,⁵ this note will address the barriers that people with severe mental disabilities continue to face in the private housing market, public housing, and housing operated by mental health service providers despite the existence of the Fair Housing Amendments of 1988,⁶ the Americans with Disabilities Act ("ADA"),⁷ and Section 504 of the Rehabilitation Act of 1973.⁸ Throughout this examination of

³ I will use the term "disability" rather than "handicap" because it is the preferred term of people with disabilities. Some statutory language, however, uses the term "handicap" rather than "disability." The language we use to describe certain conditions has changed dramatically due to changes in how society perceives people with disabilities and mental disabilities specifically. See ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 9 (1996) ("The word *disability* has gained wide acceptance because it goes beyond the narrowly medical approach that proved inadequate either to serve people with mental (or physical) disorders or to respect their rights. In particular, the use of the word *disability* conveys the social consequences of a condition."); see also Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 343 (2001) ("[T]he term 'disabled' is used in the ADA rather than the previously used term 'handicapped,' because the term 'handicapped' was viewed as describing one who held his cap in hand, asking for charitable assistance.").

⁴ Disorders such as schizophrenia include debilitating symptoms that frequently make maintaining housing difficult for an individual. Individuals with schizophrenia may have difficulty with daily living tasks, such as grooming, paying rent, cooking, or maintaining an apartment. See generally Sidney D. Watson, *Discharges to the Streets: Hospitals and Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 357, 359 (2000). Of course, many people lead fulfilling lives in spite of their disability and are quite capable of living independently in the community.

⁵ See generally JOHN Q. LA FOND & MARY L. DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* 23 (1992) (providing overview of shifting public attitudes and social policy toward mental illness); Cushing N. Dolbeare, *Housing Policy: A General Consideration*, in *HOMELESS IN AMERICA* 34-37 (Jim Baumohl ed., 1996) (providing a history of housing policy in the United States); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993) (exposing the historical mistreatment and examining the legal status of people with disabilities).

⁶ 42 U.S.C. § 3601 (2000).

⁷ *Id.* § 12101.

⁸ 29 U.S.C. § 794(a) (2000). The Fair Housing Act provides the primary mechanism for

barriers to housing, the likely experiences of *A* and *B* will be compared and contrasted.

II. THE ORIGINS OF THE HOUSING CRISIS FOR INDIVIDUALS WITH SEVERE MENTAL DISABILITIES

Individuals with severe mental disabilities⁹ are particularly susceptible to discrimination as compared to individuals with physical disabilities,¹⁰ and the stigma of mental illness remains.¹¹ Until the 1950s, many individuals with mental disabilities were segregated from society through hospitalization in state mental institutions against their will.¹² Housing policies did not address the needs of

countering discrimination in housing based on disability. Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act proscribe discrimination based on disability in the delivery of public services and in federally funded programs.

⁹ Severe mental disabilities are "persistent mental or emotional disorders (including, but not limited to, schizophrenia, schizoaffective disorders, mood disorders, and severe personality disorders) that significantly interfere with a person's ability to carry out such primary aspects of daily life as self-care, household management, interpersonal relationships, and work or school." FED. TASK FORCE ON HOMELESSNESS & SEVERE MENTAL ILLNESS, *OUTCASTS ON MAIN STREET* 7 (1992) [hereinafter *OUTCASTS ON MAIN STREET*].

¹⁰ Although statutes providing protections and benefits to people with disabilities include people with mental disabilities, the inclusion of people with mental disabilities was resisted and reflects the stigma associated with mental illness. SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* 78 (2001).

The history of disability benefits law itself is one more aspect of the history of discrimination against people with mental disabilities. In almost every federal statute conferring disability benefits, benefits for people with mental disabilities were added at a later date, added in a weakened or diluted form, or excluded altogether Although people with diagnoses of mental illness constitute a far greater proportion of people with disabilities than those with "traditional" disabilities such as blindness or deafness, the proportion of federal expenditures on programs to provide assistance, education, and advocacy to people with physical disabilities is far higher than appropriations to equivalent programs for people with diagnoses of mental illness.

Id.

¹¹ People with mental disabilities have long been subject to discrimination. For instance, people with mental disabilities have been denied their right to vote. *See, e.g.,* Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481 (2001) (providing an overview of state laws that disenfranchise people with disabilities). Some state constitutions continue to contain language that is both offensive and disenfranchising. *See, e.g.,* OH. CONST. art. V, § 6 ("No idiot, or insane person, shall be entitled to the privileges of an elector."). They also have faced discrimination in employment and housing and encountered state laws that limit their ability to raise children or drive a car. LEVY & RUBENSTEIN, *supra* note 3, at 152.

¹² In the Nineteenth and early Twentieth century, mental health treatment was nonexistent,

individuals with severe mental disabilities because state institutions served as the primary source of housing. As people became increasingly aware of the poor conditions of state mental institutions, advocates for individuals with mental disabilities filed lawsuits on behalf of institutionalized patients, challenging both the state's ability to infringe on their liberty interests without demonstrating a sufficient cause for doing so and its failure to provide adequate treatment.¹³ These lawsuits triggered the period frequently referred to as "deinstitutionalization."¹⁴

and people with mental disabilities were either cared for by family members or subjected to poor houses and jails. LEVY & RUBENSTEIN, *supra* note 3, at 17. Social reformers, such as Dorothea Dix, responded to the plight of individuals with mental illnesses by calling for the creation of asylums for the insane. E. FULLER TORREY, *SURVIVING SCHIZOPHRENIA* 319 (1995). Dix visited poor houses and jails to document the atrocious living conditions of people with mental disorders. She testified before state legislatures for the need to provide treatment that emphasized hope and progress for people with mental disabilities. She also warned of the consequences of inhumane conditions and inadequate treatment that people were subjected to. *Id.* Asylums were believed to provide a peaceful environment that would cure people with mental disorders. LEVY & RUBENSTEIN, *supra* note 3, at 17. These reform efforts led to the creation of state operated mental health hospitals. *Id.* The asylums failed to provide a cure and ultimately served as a warehouse for people viewed as unfit and dangerous to the larger society. *Id.*

¹³ Litigation to improve the conditions of mental institutions led to litigation to assist people in moving out of these institutions. STEFAN, *supra* note 10, at 82–83. The movement of civil rights for individuals with mental disabilities included the push for substantive standards and procedural rights. *Id.* Substantive standards were developed for commitment proceedings, such as requiring dangerousness, recent overt acts, or the imminent threat of harm. *Id.* The demand for procedural rights included the right to a hearing, representation by counsel, and cross-examination of witnesses. *Id.*

¹⁴ Beginning in the 1950s, deinstitutionalization of people with mental disabilities became a national trend. "Between 1955 and 1978 the average daily census in state mental institutions plummeted from 559,000 to 149,000 and has since dropped further to about 100,000 people today." LEVY & RUBENSTEIN, *supra* note 3, at 19 (footnotes omitted). In part, deinstitutionalization was made possible through the development of psychotropic drugs that reduced the symptoms of mental disorders. *Id.* Public outcry due to the increased awareness of the inhumane conditions and treatment of people within mental institutions also prompted the move towards deinstitutionalization. *Id.* Advocates for the rights of individuals with mental disabilities criticized the state mental health hospitals for depriving individuals of their civil liberties by institutionalizing them. "Instances of abuse and neglect [were] documented regarding institutional care. Residents and their families complain[ed] of unsanitary conditions, abuse by residents, and neglect by caregivers." Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL'Y 695, 703 (2001). Institutions failed to provide safe and effective treatment for mental disorders and demonstrated little success in moving people to less restrictive environments. *Id.* at 715. "Even for those who do not suffer egregious neglect, life in large institutions often leads to a degree of institutional dependence, which manifests in a loss of social and vocational competencies and atrophy of the ability to live outside the institution." *Id.* at 703–04.

Treatment that had once been primarily limited to state mental health hospitals shifted to community mental health centers.¹⁵

Deinstitutionalization dramatically changed the provision of services for individuals with mental disabilities. Prior to this trend, state hospitals had been the sole providers of all the patient's needs. With the onset of deinstitutionalization, people required assistance in navigating the community to meet their various needs. Community mental health workers assisted clients not only with obtaining ongoing mental health services, but also with obtaining housing, food, medical care, government entitlements, and other necessities for community living.

Today, deinstitutionalization has both its champions and its critics.¹⁶ The visible increase in the number of homeless people in the 1980s was believed to be the result of the combination of deinstitutionalization and insufficiently funded mental health services that were unable to provide the safety net needed to prevent or disrupt the cycle of homelessness.¹⁷ To address the plight of homeless individuals with mental disabilities, Congress passed the Stewart B. McKinney Homeless Act of 1987,¹⁸ which provided funding for housing, treatment, and

¹⁵ The emergence of community mental centers provided a new system for delivering mental health treatment and provided individuals with mental disabilities with greater opportunities to live in more integrated settings. "Studies show that those in community-based treatment programs spend more time with friends and social groups, have a higher level of self-esteem, show fewer symptoms, and comply more consistently with medication and treatment plans." Smith & Calandrillo, *supra* note 14, at 704.

¹⁶ "Sociological studies in the 1950's and 1960's revealed that public mental hospitals, rather than being therapeutic communities, were vast dehumanizing warehouses whose neglected, ill-fed, and abused inmates could, with little exaggeration, be counted among the living dead." Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 380 (1982). Critics charge that the money previously spent operating the state institutions was not redirected for community care, and the resulting mental health services were inadequate:

Because of pressure from state departments of mental health to discharge patients from state hospitals, seriously mentally ill individuals are frequently placed into housing that would not be considered fit for anyone else Because of the failure of mental health professionals to provide medications and insure aftercare for discharged patients, many individuals with schizophrenia undergo a revolving door of admissions and readmissions to hospitals, jails, and public shelters.

TORREY, *supra* note 12, at 3. Torrey is extremely critical of the role of lawyers who:

dedicated their careers to bringing lawsuits against states, getting mental patients released from hospitals, making it extremely difficult to involuntarily hospitalize or treat them, and passing state legislation to effectively hasten deinstitutionalization The numbers of mentally ill homeless persons, with freedom to be perpetually psychotic, are a testimony to their success.

Id. at 25.

¹⁷ Watson, *supra* note 4, at 359.

¹⁸ 42 U.S.C. § 11301 (2000).

support services.¹⁹ Additionally, the development of low-income housing, although not solely intended for people with disabilities, also provided housing opportunities for individuals with mental disabilities.²⁰

The Rehabilitation Act of 1973 was the first congressional attempt at addressing discrimination against people with disabilities.²¹ The statute provides that recipients of federal funds are prohibited from engaging in discrimination in any program or activity against people with disabilities.²² The Fair Housing Act of 1968, which had prohibited discrimination in housing on the grounds of race, color, religion, and national origin, was amended by the Fair Housing Amendments of 1988 ("FHAA"), which extended protection to individuals with disabilities.²³ The ADA, like Section 504 of the Rehabilitation Act of 1973, does not provide protection from discrimination in housing, but the ADA does provide

¹⁹ See generally Latisha R. Brown, *The McKinney Act: Revamping Programs Designed to Assist the Mentally Ill Homeless*, 33 COLUM. J.L. & SOC. PROBS. 235, 241-46 (2000) (describing federal programs designed to meet needs of homeless people with mental disabilities). A 1990 amendment to the McKinney Act created the Shelter Plus Care program, a program designed to provide assistance to homeless individuals with disabilities. Nat'l Coalition for the Homeless, Fact Sheet #18, at <http://www.nationalhomeless.org/mckinneyfacts.html> (April 1999) ("While inadequate funding clearly impedes the effectiveness of the McKinney Act programs, the McKinney Act's greatest weakness is its focus on emergency measures—it responds to the symptoms of homelessness, not its causes.").

²⁰ Dolbeare, *supra* note 5, at 38.

²¹ "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2) (Definitions). Similar language defining disability is contained in the Fair Housing Act and the Rehabilitation Act of 1973. See 42 U.S.C. § 3602(h); 29 U.S.C. § 705(9)(A) (2000).

²² Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000), provides that "[n]o other qualified handicapped individual in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." This statute provided the groundwork for other statutes conferring protections to people with disabilities, but its "lackluster" regulations and enforcement disappointed disability advocates. LEVY & RUBENSTEIN, *supra* note 3, at 154-55.

²³ Individuals with disabilities "have experienced discrimination because of prejudice and aversion—because they make non-handicapped people uncomfortable. The [FHAA] clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living." H.R. REP. NO. 100-711, reprinted in 1988 U.S.C.C.A.N. 2173, 2179. The FHAA applies to all private and public housing. The FHAA makes it an unlawful practice to discriminate in the terms, conditions, or privileges of sale or rental of a dwelling; or in the provision of services or facilities in connection with such dwelling because of the disability of the buyer or renter, a person intending to reside in the dwelling, or any person associated with the buyer or renter. 42 U.S.C. § 3604(f)(2).

individuals with rights in the realm of the delivery of services.²⁴ The passage of the ADA of 1990 renewed the commitment to ending the segregation of individuals with mental disabilities by providing a mechanism for ensuring that treatment is provided in the most integrated setting possible.²⁵ Litigation has been successful in requiring the discharge of patients from institutions when a less restrictive setting would be suitable.²⁶ Requiring services to be provided in the least restrictive setting has been hailed as a victory for disability advocates.²⁷

Despite these statutory achievements, and the recognition of the rights of the mentally disabled initially prompting deinstitutionalization, the need for greater protections and rights for individuals with severe mental disabilities remains. Once state mental institutions were no longer the primary provider of housing, individuals with severe mental disabilities returned to their communities, which were often ill-equipped to provide the necessary housing and remain so years after deinstitutionalization. When individuals are discharged from a psychiatric hospital, homeless shelters or the streets too frequently are the only places for

²⁴ The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A public entity is any state or local government or any department, agency, or instrumentality of a state or local government. *Id.* § 12131(1). Discrimination against people with mental disabilities was frequently the result of state action. STEFAN, *supra* note 10, at 99. States subjected individuals with mental disabilities to forced sterilizations, prohibitions against marriage, termination of parental rights and exclusionary zoning laws. *Id.* The Supreme Court recently held that the Eleventh Amendment bars suits in federal courts based on Title I of the ADA to recover monetary damages against state employers. *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001). The question whether plaintiffs may sue a state under Title II of the ADA in federal courts for monetary damages remains unanswered. See Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protections Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002) (providing a survey of state laws that prohibit disability discrimination).

²⁵ To implement Title II of the ADA, the Department of Justice promulgated the "integration regulation," which states: "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2002).

²⁶ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Prior to *L.C.*, it was unclear to what degree the ADA mandated the states to provide services in the most integrated setting. See, e.g., *Williams v. Sec'y of the Executive Office of Human Servs.*, 609 N.E.2d 447, 453 (Mass. 1993) (recognizing that "deinstitutionalization with subsequent services may be highly desirable for individuals [who are mentally ill and homeless], [but] such services are not required as a matter of law by the ADA").

²⁷ Ira Burnheim & Jennifer Mathis, *After Olmstead v. L.C.: Enforcing the Integration Mandate of the Americans with Disabilities Act*, 33 CLEARINGHOUSE REV. 633, 648 (2000) ("[T]he *L.C.* decision affords [advocates] a tremendous opportunity to push states to expand community-based services for individuals with disabilities.").

them to go, resulting in the disproportionate number of individuals with mental disabilities among the homeless population.²⁸

III. THE EXTENT OF THE HOUSING CRISIS PRESENTLY FACING INDIVIDUALS WITH MENTAL DISABILITIES

A. Barriers in the Private Housing Market

The majority of the private housing market²⁹ is simply unavailable to people with mental disabilities because of the dearth of affordable housing. Stringent financial requirements that have not been considered unlawful³⁰ and that

²⁸ Difficulties in defining who is homeless and in determining accurate measures to count individuals considered homeless are typical of most studies of the homeless population. Kim Hopper & Jim Baumohl, *Redefining the Cursed Word: A Historical Interpretation of American Homelessness*, in HOMELESS IN AMERICA, *supra* note 5, at 3; *see also* E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 16 (1997) (citing studies that range from 250,000 to 600,000 when estimating the number of homeless people). Despite this difficulty in ascertaining accurate numbers regarding homelessness, numerous studies suggest that the homeless population is disproportionately comprised of individuals with mental disabilities. Individuals with mental illness constitute anywhere from twenty-five to fifty percent of the homeless population. Watson, *supra* note 4, at 359. Fifty percent of the homeless population has a diagnosable substance abuse problem. *Id.* Almost thirty percent of homeless individuals have recently undergone inpatient detoxification. *Id.* at 359 n.5. Almost one fourth of the homeless population has recently been released from inpatient mental health treatment. *Id.* at 363.

²⁹ The private housing market is subject to the provisions of the Fair Housing Amendments of 1988 (FHAA) (codified at 42 U.S.C. § 3601 (2000)), which prohibits discrimination on the basis of disability in the provision of housing.

³⁰ In *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir. 1975), the court refused to find a property owner's rule that required a tenant's weekly income to equal ninety percent of the monthly rent to be discriminatory despite its disparate impact on minority groups. Advocates have criticized this ruling because:

Public assistance tenants are arguably the best tenants, enjoying a guaranteed income that is not dependent on job stability and local economics. Yet, because welfare level families typically must pay in excess of fifty percent of their income for housing, they often do not meet artificially constructed affordability formulae.... The exclusion of welfare recipients is more likely tied to the landlord's desire not to stigmatize the project as "welfare housing."

James A. Kushner, *The Fair Housing Amendment Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1105 (1989). *But see* *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989). The *Bronson* plaintiffs challenged two landlord policies—refusing Section 8 subsidies and requiring tenants to have incomes three times the amount of rent. *Id.* at 152. The court granted the plaintiff's request for a temporary restraining order and found a prima facie showing of disparate impact based on race. The court seemed to distinguish the case from *Boyd* on three grounds. First, the plaintiffs demonstrated through the use of statistics that the policies of the landlord had a disparate impact on

discriminate based on poverty or source of income may have a disparate impact on individuals with mental disabilities when they attempt to access housing, because individuals with severe and persistent mental disabilities are disproportionately poor. Anti-discrimination laws, however, do not view poverty as a proxy³¹ for disability status,³² and landlords who have refused housing on the basis of financial status or on the basis of the source of income have received favorable court decisions upholding their practices.³³

Stringent application procedures, such as intrusive questioning regarding the disability of the individual and requests for the release of confidential medical records, that prevented mentally disabled individuals from obtaining housing in the past have been found to violate the Fair Housing Act.³⁴ In *Cason v. Rochester*

minorities. *Id.* at 154. Second, the court found it significant that the landlord had existing tenants with Section 8 subsidies, all of whom were white. *Id.* at 156 n.9. Finally, the court noted evidence of discriminatory intent. *Id.* at 157.

³¹ According to two authors, to “the extent that owners use vouchers as a proxy for racial or other kinds of discrimination and deny housing to voucher holders, interventions encompass fair housing enforcement.” Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUSING & CMTY DEVELOPMENT L. 319, 324 (2000). Case law, however, does not suggest that courts are willing to find this conduct unlawful, although “[s]ome jurisdictions prohibit discrimination based upon source of income or source of rent payment as well.” *Id.*

³² Many individuals with disabilities, and particularly individuals with severe and persistent mental disabilities, receive financial assistance from the federal disability program, Supplemental Security Income benefits program (SSI), as their sole source of income. 20 C.F.R. § 416.110 (2002) (“The basic purpose underlying the supplemental security income program is to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level.”). A recent study describes the housing crisis faced by people whose sole source of income is SSI. Sherry Trafford, *Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities*, 33 CLEARINGHOUSE REV. 131, 132 (1999). Four million, three hundred-thousand people rely on SSI. *Id.* at 132. There are no housing markets in the nation in which a recipient of SSI can obtain a modest efficiency apartment when allocating thirty percent of one’s monthly income for rent. *Id.* In some states, recipients of SSI would have to pay more than an entire month’s SSI payment to obtain housing, and in thirty-nine states, recipients of SSI would pay over half of their income for housing. *Id.*

³³ See, e.g., *Schanz v. Vill. Apartments*, 998 F. Supp. 784, 790 (E.D. Mich. 1998) (holding that the landlord’s financial criteria, including a minimum income requirement and limitations on who could co-sign leases, were not discriminatory); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) (holding that the landlord’s refusal to rent to individuals with disabilities who received Section 8 housing assistance did not violate the Fair Housing Act).

³⁴ See, e.g., *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (holding that requiring disabled applicants to prove their ability to live independently violated the Fair Housing Act and the Rehabilitation Act and that inquiring into disabled applicants’ ability to live independently was prohibited by regulations of the Department of Housing and

Housing Authority, the plaintiffs challenged intrusive questioning regarding their disabilities, but they did not challenge, nor did the court address, the Housing Authority's consideration of "an applicant's past performance in meeting financial obligations."³⁵ For some individuals with mental disabilities, evaluating past performance in meeting financial obligations will be detrimental to efforts to obtain housing.³⁶ Although it would be difficult to argue that no consideration whatsoever should be given to an applicant's previous ability to pay rent in a timely manner, this requirement would be insurmountable for some individuals with mental disabilities without some reasonable accommodation³⁷ on the part of the landlord.³⁸

Urban Development).

³⁵ *Id.* at 1004.

³⁶ Several mental disorders are associated with impulse control problems that may contribute to financial problems. One symptom of a manic episode is the "excessive involvement of pleasurable activities that have a high potential for painful consequences (e.g., engaging in unrestrained buying sprees . . . or foolish business investments)." DSM-IV, *supra* note 2, at 332. Bipolar disorder is characterized by the occurrence of one or more manic episodes. *Id.* at 350.

³⁷ Unlawful discriminatory practices include the refusal on the part of the landlord to allow, at the expense of the disabled individual, reasonable modifications necessary to the individual for full enjoyment of the premises. 42 U.S.C. § 3604(f)(3)(A) (2000). Refusing to make reasonable accommodations in the rules, policies, practices, or services may also constitute an unlawful discriminatory practice. *Id.* § 3604(f)(3)(B); *see also, e.g.*, *Roe v. Sugar River Mills Assos.*, 820 F. Supp. 636, 638 (D.N.H. 1993) (ruling that housing provider has a "statutory duty to explore whether reasonable accommodation might be undertaken to eliminate or sufficiently minimize the impact of his handicap," which consists of outbursts containing obscene, offensive, and threatening language); *Roe v. Hous. Auth.*, 909 F. Supp. 814, 822-23 (D. Co. 1995) (adopting rationale of *Roe v. Sugar River Mills Associates* that requires housing provider to demonstrate that no reasonable accommodation exists before it can lawfully evict the tenant with a mental disability). To establish a *prima facie* case of a failure to accommodate, the plaintiff must demonstrate: (1) membership in the protected class—an individual with a disability; (2) that the landlord was aware of the disability; (3) that an accommodation was necessary to provide the plaintiff equal opportunity to use and enjoy the dwelling; and (4) that the landlord refused to make the accommodation. *Schanz*, 998 F. Supp. at 791. Courts will not grant an accommodation to a disabled individual unless the accommodation is both necessary and reasonable. 42 U.S.C. § 3604(f)(3)(B).

³⁸ One commentator writes:

One can envision the application of the principle of reasonable accommodation as a joint-venture between the landlord and the tenant. Take for example the case of a tenant who does not have adequate references because she has been in an institution. Instead of simply refusing to provide housing for the tenant because she has no references, the landlord and the tenant can work together to satisfy the requirement. Perhaps the tenant will feel comfortable with providing (and the landlord may agree to accept) a reference by a mental health professional or a social worker.

Richard B. Simring, Note, *The Impact of Federal Antidiscrimination Laws on Housing for People with Mental Disabilities*, 59 GEO. WASH. L. REV. 413, 434 n.114 (1991).

One form of reasonable accommodation that would address this problem would be allowing the disabled individual to provide a co-signer or guarantor to the lease. Some recipients of SSI have a representative payee, a person who receives the SSI payments on behalf of the disabled individual and is responsible for payment of that individual's bills.³⁹ Family members, friends, or social service providers frequently serve as representative payees for disabled individuals.⁴⁰ Unfortunately, courts appear to be hostile to this type of accommodation for financial requirements.⁴¹

Landlords are permitted not simply to discriminate on the basis of how much income a prospective tenant has, but also on the basis of the source of that income.⁴² Disabled individuals, based on economic need, may be eligible for financial assistance for housing through several federal programs. The Section 8 program provides the prospective tenant with a voucher that may be used to obtain housing from a private landlord. In *Salute v. Stratford Greens Garden Apartments*, the court held that the landlord's refusal to accept Section 8 certificates did not violate the FHAA mandate to provide reasonable accommodations.⁴³ The court distinguished between the disability of the prospective tenants and the housing assistance that was available to them because of that disability.⁴⁴ The court noted that, "[w]hat stands between these plaintiffs and the apartments at Stratford Greens is a shortage of money, and nothing else Thus, the accommodation sought by plaintiffs is not 'necessary' to

³⁹ 20 C.F.R. § 416.601 (2002).

⁴⁰ *Id.* § 416.621.

⁴¹ In *Schanz v. Village Apartments*, 998 F. Supp. 784, 786 (E.D. Mich. 1998), the plaintiff, an individual with a mental disability, who submitted an application for an apartment, was refused housing because he failed to meet the credit and income requirements of the landlord. *Id.* After receiving notice that his application had been denied, he requested that the landlord accommodate his disability by allowing a third party to guarantee his rental payments. *Id.* at 786–87. The court rejected the plaintiff's request for accommodation. *Id.* at 791. The court found the landlord's rejection of the guarantor agreement was nondiscriminatory and legitimate, even though the landlord had offered another prospective tenant to have her mother co-sign the lease. *Id.* at 790. The landlord had a policy that only allowed family members to serve as co-signors. *Id.* The landlord justified this policy on grounds that it was easier to conduct a credit check on an individual rather than a corporation, that a family member would have a greater moral obligation to fulfill the obligations of the lease than a corporation would, and that there are fewer defenses available to the co-signor than there are to the guarantor. *Id.*

⁴² *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998). *But see* *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989) (granting plaintiff's motion for a preliminary injunction because the landlord's refusal to accept applications from recipients of Section 8 housing assistance disproportionately affected minorities).

⁴³ *Salute*, 136 F.3d at 293.

⁴⁴ *Id.*

afford handicapped persons 'equal opportunity' to use and enjoy a dwelling."⁴⁵ By accepting the notion that the landlord's refusal to accept Section 8 subsidies does not impair disabled individuals' equal opportunity to obtain housing, the court provides landlords the ability to discriminate based on a factor that is directly related to the disability. The Ninth Circuit adopted an alternative view in *Gilligan v. Jamco Development Corp.*⁴⁶ by reversing a dismissal based on a failure to state a claim. The plaintiff, Gilligan, was denied the opportunity to view an apartment when the landlord discovered that she was a recipient of Aid to Families with Dependent Children.⁴⁷

What does the nature of the private housing market mean for the hypothetical individuals, *A* and *B*? Given the high cost of rental units, it may be unlikely that *A* could obtain an apartment without a subsidy, even though she supplements her disability payments with part time work. *A* would likely be eligible for a Section 8 subsidy, which provides a private landlord with the amount of money needed to meet her rental payment that is in excess of 30% of her income.⁴⁸ Private landlords are free to choose not to participate in the Section 8 program, so there may be a shortage of landlords willing to accept her subsidy. *A* will also be limited to apartments that have rental payments that fall within HUD's fair market rental value amount.⁴⁹ Given that, *A* may find herself limited to housing that is located in low-income neighborhoods or disproportionately comprised of people with disabilities. *B*, on the other hand, is most likely closed out of the private housing market.⁵⁰ Although likely to be eligible for a Section 8 subsidy as well it

⁴⁵ *Id.* at 302. The court failed to acknowledge the recognition of Congress that disabled Americans are frequently economically disadvantaged because of their disabilities.

[C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals

42 U.S.C. § 12101(a)(6), (a)(8) (2000) (findings and purposes).

⁴⁶ 108 F.3d 246 (9th Cir. 1997). The *Gilligan* case was not based on disability discrimination, but rather on familial status.

⁴⁷ The *Gilligan* court found that the plaintiff's contention that the landlord's "refusal to consider applicants receiving AFDC benefits [was] a pretext for intentional discrimination against families with children" had sufficiently stated a claim under the Fair Housing Act. *Gilligan*, 108 F.3d at 248. The plaintiff also contended that "the source of income restriction, even if it is neutral on its face, has the effect of discriminating against families." *Id.*

⁴⁸ Maney & Crowley, *supra* note 31, at 326.

⁴⁹ *Id.*

⁵⁰ Shelter considered "housing of last resort" may be available to individuals like *B*. A recent newspaper article described the horrific conditions of units available for \$55 a week in a rooming house in downtown Columbus, Ohio. Jill Riepenhoff, *Hard-luck Haven*, COLUMBUS DISPATCH, Jan. 20, 2002, at B1. Although affordable, housing such as this does not provide safe

is unlikely that a private landlord would be willing to rent to *B*, with her history of evictions and bad credit, regardless of the fact that the payment would be sent directly from the local housing authority. The fact pattern indicates that she has no income, so she would be limited to housing that included utilities. If she regains her SSI benefits, the landlord is still under no obligation to accept payment from someone who serves as her representative payee.

B. Barriers in Public Housing

As a result of the dearth of affordable housing in the private market,⁵¹ many people with mental disabilities must turn to public housing to meet their needs.⁵² Public housing authorities, like the private housing market, are subject to the FHAA. In addition, public housing authorities are subject to the provisions of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.⁵³ Three different models comprise federally funded public housing: tenant-based assistance, project-based assistance, and public housing that is owned and operated by local public housing authorities.⁵⁴

The number of public housing units available to individuals with severe mental disabilities is diminishing at an alarming rate just as it is in the private

and sanitary living conditions for its tenants. "The enclosed stairwell [of the rooming house] offers a haven from the weather and privacy to urinate, defecate and smoke a rock of crack. The swinging doors, which have no locks, provide unfettered access." *Id.* Contemplating the rooming house's closure in the near future, the manager acknowledges that in spite of the horrible conditions many of the tenants "have no where else to go."

⁵¹ The number of low-cost rental housing units has been on the decline. "[P]recipitous losses befell the stock of single-room-occupancy (SRO) hotels, the housing of last resort for those on society's margins, and a particularly important source of housing for poor single persons, including the severely mentally ill and down-and-out substance abusers." Paul Koegel et al., *The Causes of Homelessness*, in *HOMELESS IN AMERICA*, *supra* note 5, at 24, 27.

⁵² Trafford, *supra* note 32, at 132.

⁵³ Like the FHAA, Section 504 and the ADA, both impose a duty to reasonably accommodate the disability of a qualified person. 24 C.F.R. § 8.33 (2002).

A recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps. The recipient may not impose upon individuals with handicaps other policies, such as the prohibition of assistive devices, auxiliary alarms, or guides in housing facilities, that have the effect of limiting the participation of tenants with handicaps in the recipient's federally assisted housing program or activity in violation of this part.

Id. An accommodation may not cause undue financial or administrative hardship on a landlord, nor may it require a fundamental alteration in the nature of the program. 24 C.F.R. §§ 8.23(b), .24(a)(2) (2002).

⁵⁴ Maney & Crowley, *supra* note 31, at 323. Tenant-based assistance is commonly known as a voucher or certificate associated with the Section 8 program. *Id.* Project-based assistance is tied to a specific property that is privately owned. *Id.*

housing market. In 1992, Congress amended the housing laws to enable affordable housing providers to restrict housing to the elderly.⁵⁵ The elderly were pitted against the non-elderly disabled in a debate that “centered around the question of whether the ‘mixing’ of elderly households and non-elderly people with disabilities in the same buildings was a feasible housing policy.”⁵⁶ Reports indicate that between 268,500 and 293,500 units that receive federal subsidies are currently designated for only the elderly, resulting in approximately 25% fewer housing units available to people with disabilities.⁵⁷ Congress did not act to replace this loss of housing units open to people with disabilities until 1997, despite the impact that the “elderly only” policy would have on the ability of individuals with disabilities to obtain housing.⁵⁸ Civil rights and disability

⁵⁵ 42 U.S.C. § 13611 (2000). Two different HUD programs may opt to be designated as “elderly only” housing: public housing buildings that are owned by public housing authorities and project-based housing that receives federal subsidies. These two housing programs accounted for approximately 1.1 million housing units. Ann O’Hara et al., *What’s Wrong with This Picture? An Update on the Impact of Elderly Only Housing Policies on People with Disabilities*, Opening Doors 1, 3–4 at <http://www.c-c-d.org/od-Sept01.htm> (Sept. 2001). Before 1992, housing providers receiving assistance for elderly or handicapped families under Section 202 of the Housing Act of 1959 could lawfully exclude individuals with disabilities:

It is now well established that the Housing Act of 1959, of which section 202 provides a federal funding source, “clearly permits HUD to approve a loan to any single sponsor who wishes to build housing only for the elderly or only for some class of handicapped persons A sponsor need not serve *all* eligible needy groups.”

Almonte v. Pierce, 666 F. Supp. 517, 530 (S.D.N.Y. 1987) (quoting *Brecker v. Queens B’nai B’rith Hous. Dev. Fund Co.*, 798 F.2d 52, 56 (2d Cir. 1986)); *see also* *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1349 (10th Cir. 1987). *But see* *Bolthouse v. Continental Wingate Co.*, 656 F. Supp. 620, 631 (W.D. Mich. 1987) (holding that the landlord who received funding under Section 202 of the Housing Act of 1959 and refused to rent apartments to the mentally disabled violated the Rehabilitation Act). The *Bolthouse* court recounted how the disabled “find that they are further handicapped by the Catch-22 of being told that they are unqualified—*because* of their handicap—to receive housing assistance which they are *entitled* to receive . . . *because* of their handicap.” *Id.* at 629.

⁵⁶ O’Hara et al., *supra* note 55. For an overview of the housing needs of the elderly, *see* Kevin M. Cremin, Note, *The Transition to Section 8 Housing: Will the Elderly Be Left Behind?*, 18 YALE L. & POL’Y REV. 405 (2000); *see also* Christine M. Cedrone, *Public Housing for the Elderly in Massachusetts: How Federal and State Disability Laws and Regulations Have Created a Sense of Confinement*, 8 ELDER L.J. 337 (2000) (arguing that “mixed housing” for the elderly and the disabled endangers the safety of the elderly and restricts their ability to move freely in the community).

⁵⁷ O’Hara et al., *supra* note 55. The Technical Assistance Collaborative (“TAC”) and the Consortium for Citizens with Disabilities Housing Task Force (“CCD Housing Task Force”) dispute studies conducted by the federal government that suggest that the “elderly only” laws did not harm the interests of the disabled population. *Id.* TAC’s research also indicates that public housing authorities have not been accessing the alternative housing resources available following the election to designate existing housing as “elderly only.” *Id.*

⁵⁸ *Id.* Public housing authorities were permitted to designate buildings as disabled only

advocates predict that the trend toward designating housing as "elderly only" will continue.⁵⁹

The impact that "elderly only" policies will have on individuals with disabilities is not ascertainable. Owners and managers of privately owned housing who receive federal financial assistance are permitted to designate property as "elderly only" without any corresponding reporting requirement to HUD.⁶⁰ As a result, no mechanism is in place to determine exactly how many housing units are becoming unavailable to people with disabilities. Due to the complicated nature of the regulations, advocates fear that many private owners and managers may be implementing "elderly only" policies improperly and in violation of laws outlawing discrimination.⁶¹

Three other recent legislative changes to public housing laws further diminish the availability of public housing opportunities and may have a disparate impact⁶²

buildings, in addition to the "elderly only" buildings. *Id.* This, however, appears to fly in the face of the Americans with Disabilities Act, which proscribes the segregation of individuals with disabilities. Trafford notes that:

[Recent] statutory changes signal a shift in affordable housing policy that runs directly counter to social and mental health policies regarding the full integration of people with disabilities into the mainstream of American life. Public and assisted housing never offers an ideal opportunity for integration into mainstream communities because such housing traditionally serves a disproportionate percentage of people who are elderly or who have disabilities. These options, however, at least allow for noninstitutional housing.

Trafford, *supra* note 32, at 133.

⁵⁹ See O'Hara et al., *supra* note 55:

This loss of housing opportunity will have occurred at a time when the demand for affordable housing from people with disabilities has never been greater. With virtually no new construction of public housing being authorized by Congress, it is clear that people with disabilities will increasingly be 'shut out' of federally funded public housing.

⁶⁰ *Id.* Two studies have been conducted to survey whether privately operated housing that receives federal financial assistance has designated housing as "elderly only." One study, funded by HUD, surveyed fifty properties, thirty-two of which had some housing designated for the "elderly only." *Id.* The U.S. General Accounting Office ("GAO") conducted a broader study that "found that 71 percent of owners had tenant selection policies or practices that restricted or prohibited people with disabilities from moving into their housing developments." *Id.*

⁶¹ *Id.*

⁶² In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court appeared to recognize that disparate impact claims were cognizable under Section 504 of the Rehabilitation Act. *Id.* at 298. In this case, individuals with disabilities brought a case against the state of Tennessee for reducing the number of inpatient bed days from twenty to fourteen. *Id.* at 287. The plaintiffs argued that the decrease in bed days (i.e. the number of days that Medicaid is willing to cover a recipient's hospital expenses) would have an impact on people with disabilities more than the non-disabled. *Id.* However, the Supreme Court held that not every practice can be challenged as a matter of disparate impact because of the incredible burden on the government. *Id.* at 298. The

on individuals with disabilities. First, public housing authorities may opt not to house individuals with the lowest incomes.⁶³ Second, private landlords are no longer subject to the “take one, take all” rule. Before the elimination of the “take one, take all” rule, a landlord who accepted one tenant with a Section 8 certificate could not refuse other eligible tenants with Section 8 certificates.⁶⁴ Finally, public housing landlords and landlords who accept Section 8 certificates are no longer limited to evicting clients only “for cause.”⁶⁵

Neither the Fair Housing Amendment nor the Rehabilitation Act of 1973 provides protection for current users of illegal drugs, and public housing authorities, as well as private entities, may exclude tenants based on the current, illegal use of drugs.⁶⁶ If a drug user is participating in a treatment program, however, the individual is entitled to protection.⁶⁷ Current alcoholics are protected under the Rehabilitation Act of 1973 and the Americans with Disabilities Act.⁶⁸

What does this mean for *A* and *B*? Although *A* is equally constrained by the decreasing number of units available to individuals with mental disabilities, *A* is once again much more likely to be able to obtain housing than *B*. The public

question for a court to resolve is whether the disabled have “meaningful access to the benefit.” *Id.* at 301. The Supreme Court declined to evaluate impact on the basis of whether the benefit is as valuable to the disabled person as it is to the non-disabled person. *Id.* at 308.

⁶³ Individuals with disabilities are more likely to have the lowest incomes and thus be affected by this change. Trafford, *supra* note 32, at 133.

⁶⁴ See, e.g., *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 297 (2d Cir. 1998).

⁶⁵ Trafford, *supra* note 32, at 133. Trafford explains:

For tenants who have very low incomes and receive Section 8 subsidies, these changes mean that options for affordable, stable housing are becoming scarcer. For tenants with disabilities, the effects are exacerbated by the need for stability and sometimes, special conditions that meet disability-related needs. Unfortunately prejudices that fuel landlords’ reluctance to accept tenants who are perceived as “less desirable” or as possibly imposing additional financial or administrative burdens add to the difficulty that tenants with disabilities face getting into stable, affordable housing.

Id.

⁶⁶ *Simring*, *supra* note 38, at 426–27. Compare *Peabody Properties, Inc. v. Sherman*, 638 N.E.2d 906 (Mass. 1994) (holding that tenant with a conviction for possession with intent to distribute marijuana within the past month constitutes drug use thereby preventing tenant from receiving protection under the Fair Housing Act), with *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 923 (4th Cir. 1992) (holding that clients of rehabilitation services, who were allegedly “recovering addicts” and other former drug users who had completed at least one drug-free year, came within the Fair Housing Act’s definition of “handicap,” and that the drug user/addict exclusion from the definition of handicap does not per se apply to every person who could be considered a drug addict).

⁶⁷ *Simring*, *supra* note 38, at 426–27.

⁶⁸ *Id.* at 427.

housing authority in *B*'s community may have chosen to exercise its ability to refuse to provide housing to individuals with the lowest incomes. Because *B* has no income, she may not be eligible for public housing. Minimum rent requirements of public housing authorities, however, appear to fly in the face of the primary purpose of public housing. Presumably, public housing was designed to meet the housing needs of those individuals who were unable to obtain housing in the private market. Of course, if *B*'s lack of income does not prevent her from accessing public housing, *B*'s use of drugs will effectively prevent her from obtaining subsidized and public housing.

C. Barriers to Housing Operated by Mental Health Service Providers

For individuals with severe and persistent mental disabilities, lack of housing may provide the greatest obstacle to gaining stability.⁶⁹ Simply providing housing may not be enough to end the cycle of homelessness that individuals with mental disabilities experience.⁷⁰ As a result, mental health providers increasingly moved into the realm of providing housing for consumers of mental health services.⁷¹ Mental health services providers attempted to fill in the gaps in housing for mental health consumers by developing a "residential continuum."⁷² This continuum was intended to provide housing for a consumer that begins with emergency shelter and progresses to a group home, followed by a supported

⁶⁹ Discrimination against people with mental disabilities persists in the delivery of services to homeless people. Homeless people with mental disabilities "are often excluded from programs that assist homeless people because of their mental illness . . . and from mental health treatment and substance abuse treatment programs because of their homelessness." Deirdre Oakley & Deborah L. Dennis, *Responding to the Needs of Homeless People with Alcohol, Drug, and/or Mental Disorders*, in *HOMELESS IN AMERICA*, *supra* note 5, at 179.

⁷⁰ One expert has suggested:

For a significant percentage of the homeless . . . housing, financial, and employment assistance is not enough because they may also have severe mental or physical problems that must be comprehensively treated before they can become independent, functioning members of society. Some of the problems of the most severely disabled homeless may involve long-term treatment, or there may just be no solution; nevertheless, a minimum standard of living—a roof over one's head, food, and health care—should be the right of all Americans.

Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long-term Solutions to Homelessness*, 2 *GEO. J. ON FIGHTING POVERTY* 163, 166 (1995). Wright cites several housing programs that combine housing with the provision of social services as a cost-effective means for ending homelessness. *Id.* at 205.

⁷¹ Michael Allen, *Separate and Unequal: The Struggle of Tenants with Mental Illness to Maintain Housing*, 30 *CLEARINGHOUSE REV.* 720, 721 (1996).

⁷² *Id.* at 724.

apartment, and ultimately ends with independent living.⁷³ Mental health treatment and other social services are linked on-site with the provision of housing. As a threshold matter, communities' resistance to the establishment of housing programs or group homes that serve individuals with mental disabilities is significant.⁷⁴ Societal attitudes towards mental disabilities and substance abuse frequently represent particular moral attitudes regarding whether the particular group is worthy of assistance. Attempts at countering this type of discrimination have garnered some success.⁷⁵ However, attempts to ensure that treatment is provided to meet the varying needs of the most disabled have not achieved success.⁷⁶

Group home providers tend to view themselves primarily as providers of mental health treatment, rather than providers of housing.⁷⁷ Within these housing programs, however, civil rights and disability advocates have witnessed the failure to accord individuals with mental disabilities their rights as tenants.⁷⁸ Group homes that are inextricably linked with services are arguably unlawful

⁷³ *Id.* at 721. Critics charge that mental health providers primarily developed housing that was linked to the high intensity services, such as emergency shelters or group homes. *Id.* In all likelihood, however, mental health providers, with limited funds, developed housing deemed necessary for those consumers with the greatest need. For indigent clients, there continues to be a shortage of placements available in both emergency shelters and group homes for homeless individuals with mental disabilities. Watson, *supra* note 4, at 370–71.

⁷⁴ See generally Moira J. Kinnally, Note, *Not in My Backyard: The Disabled's Quest for Rights in Local Zoning Disputes Under the Fair Housing, the Rehabilitation, and the Americans with Disabilities Acts*, 33 VAL. U. L. REV. 581 (1999) (providing an overview of the use of federal laws to combat discrimination against people with disabilities with respect to zoning).

⁷⁵ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (holding that the city's refusal to allow the operation of a home for developmentally disabled individuals could not withstand rational basis scrutiny); see also Alicia Hancock Apfel, Comment, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551, 581 (1995) (describing case law that demonstrates the use of the Fair Housing Act and the ADA to combat community animus regarding the locations of services for homeless people).

⁷⁶ *Williams v. Sec'y of the Executive Office of Human Servs.*, 609 N.E.2d 447, 459–60 (Mass. 1993) (holding that a service provider for individuals with disabilities is not obligated to provide services suited to meet the needs of individuals with complicated disabilities, such as mental illness and substance abuse).

⁷⁷ Allen, *supra* note 71, at 721. Because treatment providers do not necessarily view themselves as landlords, they are less likely to view the consumers of mental health services in terms of their ability to fulfill the obligations of the tenancy. “[T]imely payment of rent, maintaining the premises in good condition, and not disturbing the neighbors,” rather than compliance with treatment objectives, should be the deciding factors when considering eligibility of tenancy. *Id.* at 725. On the other hand, mental health services providers argue that residents are placed in group homes *because* they are incapable of paying rent in a timely manner or maintaining an apartment. Mental health service providers have stepped into the housing arena because no other housing options were available to these individuals.

⁷⁸ Allen, *supra* note 71, at 721.

under the Americans with Disabilities Act.⁷⁹ Once again, this approach to housing does not address the needs of the individuals with the most severe mental disabilities. Some individuals with mental disabilities choose not to participate in mental health treatment and, as a result, eliminate the option of housing provided by mental health providers.⁸⁰ Mandatory treatment requirements may coerce some individuals with severe mental disabilities into accepting treatment.

Neither *A* nor *B* is likely to obtain housing through mental health treatment providers. *A* may not be in need of the higher intensity services provided, and until recently, most mental health service providers operated short-term housing closer to residential treatment. *B* is unlikely to obtain housing because the nature of housing programs requires individuals to accept treatment to qualify for housing. The continuum of housing that is provided by service providers, although too intense for the needs of someone like *A*, is also not suitable for individuals like *B*. To be suitable for *B*, the program would have to forgo abstinence requirements and allow *B* to engage in treatment at her own pace. Without housing, *B* is left with the immense challenge of having to abstain from drugs and alcohol while continuing a chaotic life on the streets.

IV. RECOMMENDATIONS

A right to housing has been articulated by advocates of homeless individuals with mental disabilities.⁸¹ Given the present political climate, ascertaining this goal is highly unlikely. There are alternatives, however, short of establishing a right to housing. First, the connection between discrimination based on financial status and discrimination based on disability should be recognized. Second, housing should be created that better serves the needs of individuals with severe mental disabilities and that does not infringe on the rights of those people it is designed to assist. Finally, society's concept of "disability" and what equality means for individuals with disabilities should reflect the reality of what it means to live with a disability.

⁷⁹ *Id.* at 725. This issue has not been resolved in the courts. The ADA proscribes discrimination based on an individual's disability, but these services and housing are designed to serve people because of their disabilities.

⁸⁰ Mental health providers who also manage housing may not be willing to house those individuals deemed most difficult to treat. Individuals who are mentally disabled and refuse to be compliant with medication and other treatment may not be eligible for housing. Individuals with coexisting substance abuse disorders also may not be seen as desirable tenants in housing managed by mental health providers. As yet, there does not appear to be any requirement that appropriate services are mandated for these individuals who may be particularly difficult in the eyes of treatment providers.

⁸¹ See, e.g., Curtis J. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315 (1991).

A. Recognizing the Connection Between Discrimination Based on Financial Status and Discrimination Based on Disability

To varying degrees, landlords have been able to refuse housing to individuals with mental disabilities based on the individual's source of income⁸² or based on minimum income requirements or income-to-rent ratios.⁸³ These policies allow landlords to discriminate lawfully against people with disabilities and other protected groups under fair housing laws.⁸⁴ Individuals with disabilities comprise a disproportionate number of the people living in poverty,⁸⁵ and denying the reality of the economic plight of disabled individuals will do little to ensure the removal of barriers to housing that these individuals face. As with other forms of subordination, inequality based on disability cannot be eliminated by viewing it solely as disability discrimination. Disability discrimination is compounded by and intersects with race, class, and gender inequality.⁸⁶

⁸² Adam Culbreath & James E. Wilkinson, "No Section 8" Policies: Combating Landlords' Resistance to Renting to Section 8 Recipients, 33 CLEARINGHOUSE REV. 607, 608 (2000).

⁸³ Adam Culbreath, *Advocates' Efforts to Battle Landlords' Minimum-Income Requirements: An Overview*, 33 CLEARINGHOUSE REV. 620, 620–21 (2000).

⁸⁴ To encourage landlords not to refuse housing on these grounds, Congress responded to landlords' concerns with the Section 8 program by eliminating the "take one, take all" provision and the "good cause for eviction" provision. Culbreath & Wilkinson, *supra* note 82, at 608.

⁸⁵ Stephanie Brzuzy, *Deconstructing Disability: The Impact of Definition*, 1 J. OF POVERTY 81 (1997).

While 25 percent of American households earn less than \$15,000 per year, 50 percent of household incomes for persons with disabilities are less than \$15,000 per year . . . [T]wo-thirds of people with disabilities in America between the ages of 16 and 64 are unemployed. This is in spite of the fact that 66% of these individuals stated they would like to be working.

Id. at 89.

⁸⁶ To understand the intersection of forms of subordination, Mari J. Matsuda "ask[s] the other question":

When I see something that looks racist, I ask, "Where is the patriarchy in this?" When I see something that looks sexist, I ask, "Where is the heterosexism in this?" When I see something that looks homophobic, I ask, "Where are the class interests in this?" Working in coalition forces us to look for both the obvious and the nonobvious relationships of domination, and . . . we have come to see that no form of subordination ever stands alone.

MARI J. MATSUDA, *WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER & THE LAW* 64–65 (1996). Matsuda recognizes that sex is not the only meaningful category to consider when viewing the experiences of women. To understand the importance of the intersection of forms of subordination consider *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980), where the discrimination against the plaintiff, an African American woman, was invisible if one did not look beyond a single characteristic, either that of race or of sex. Her employer had promoted white women and African American men and had

Recognizing discrimination based on source of income or minimum rent requirements as potentially discriminating against individuals with disabilities is necessary to afford equal rights in the housing context. Although federal fair housing laws do not provide protection to individuals based on financial status, several states have enacted legislation that provides protection against discrimination in housing based on source of income.⁸⁷ To some extent, state laws have afforded protection to Section 8 tenants when federal anti-discrimination laws have not. Despite case law disfavoring the argument that source of income serves as proxy for protected class status, legal advocates also cite promising cases where courts have granted relief on this basis.⁸⁸ Although it seems logical that landlords should be able to restrict tenancy to those individuals that they feel are capable of meeting financial requirements, advocates argue that minimum rent requirements and refusals to accept housing subsidies are not valid predictors of risk.⁸⁹

B, like many individuals with mental disabilities, has limited access to housing because her disability is compounded by poverty. Eliminating disability discrimination while allowing disadvantages based on socioeconomic status to persist fails to recognize how multiple barriers limit *B*'s access to housing. The establishment of governmental programs, such as Section 8, reflects some desire on the part of Congress to ameliorate the effects of poverty. Without additional measures by Congress to encourage landlords to accept tenants, regardless of the source or type of income, too many individuals are left out in the cold.

not promoted African American women. *Id.* at 1029. She was the victim of both race and sex discrimination, but failing to evaluate her experience in light of her race *and* sex disguised the presence of discrimination. *Id.* at 1032. Application of this notion differs in the disability context, of course, because socio-economic status is not a protected class like both race and gender are. However, failure to recognize the connection between discrimination based on participation in a federal program, such as SSI or Section 8, and the individual's disability, which gives rise to the eligibility for that program, gives landlords a lawful manner in which to discriminate against disabled individuals. For a discussion of this notion in the context of race and sex discrimination, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 139 (contrasting "the multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences").

⁸⁷ Culbreath & Wilkinson, *supra* note 82, at 609.

[T]o protect Section 8 tenants, the legislation must—at a minimum—expressly define "source of income" to include "federal, state or local subsidies, including rental assistance or rent supplements." Even then the legislation must guard against other exclusionary policies, such as minimum income requirements, that would negate the source-of-income protection.

Id. at 611.

⁸⁸ See *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 160 (S.D.N.Y. 1989).

⁸⁹ Culbreath, *supra* note 82, at 620–21.

B. Developing Supportive Housing and Social Services to Meet the Needs of the Homeless Individuals with Mental Disabilities

The literature is replete with guidelines for providing effective treatment services for homeless individuals with severe mental disabilities.⁹⁰ Mental health service providers are in a unique position to determine the housing needs of homeless individuals with mental disabilities and to develop services specifically tailored to meet those needs. To ensure the rights of individuals with mental disabilities, however, housing provided by mental health treatment providers should be extricated from treatment. Rather than attempting to conform the individual to the housing, the needs of the individual should dictate the form of housing. These needs may require the development of housing for individuals who may never comply with recommendations for psychotropic medications or may never eliminate their use of alcohol or other drugs. Failing to take medications as prescribed or to engage in substance abuse treatment should not foreclose all opportunities for housing. Too frequently, these decisions to refuse treatment eliminate most, if not all, housing alternatives. Incentives should be developed to encourage housing providers to accept tenants who have the most difficulty maintaining housing. Reasonable accommodations to existing requirements based on individualized assessments of the consumers of mental health services for housing may also be an alternative for increasing access to existing services.⁹¹ Support services and treatment may be available on-site, but the use of those services should not be a condition to obtaining and maintaining services.⁹²

The current formulation of disability discrimination laws does not differentiate between the varying needs and degree of disability among the people afforded its protection. In the context of group homes, for example, one must be disabled to be eligible for the housing, but one must not be *too* disabled. One's

⁹⁰ See, e.g., *OUTCASTS ON MAIN STREET*, *supra* note 9, at 33 (1992) (recognizing the need for "a creation of a system of care addressed to the whole person"); Jay S. Levy, *Homeless Outreach: On the Road to Pretreatment Alternatives*, 81 FAMS. SOC'Y 360 (2000) (providing clinicians with guiding principles that are responsive to the needs of homeless individuals with severe mental disabilities); Paula Goering et al., *Process and Outcome in a Hostel Outreach Program for Homeless Clients with Severe Mental Illness*, 67 AM. J. OF ORTHOPSYCHIATRY 607 (1997) (describing studies that have determined that assertive case management appropriately responds to the needs of homeless individuals with mental disabilities).

⁹¹ "Where house rules or other mandatory service regulations are imposed without flexibility to a particular consumer's needs and without the consumer's full participation in both planning and implementation, they may violate the federal civil rights laws." Allen, *supra* note 71, at 727.

⁹² This is commonly known as supportive housing. Supportive housing features low demands on consumer participation but promises high intensity services for those who desire it. TONY PROSCIO, *PROVIDING SERVICES IN SUPPORTIVE HOUSING* 6 (1996), available at <http://www.csh.org/providing.pdf>.

disability and corresponding impairments must fit within the window of eligibility for the housing. At some level, this makes sense because efficiency and efficacy can be improved with a more specialized function. In reality, programs are designed to meet the needs of those individuals considered the most likely to benefit from treatment or considered more "worthy" of assistance.⁹³

Individuals like *B*, desperately need housing and treatment options that reflect their desire, if any, for assistance. Providing housing that places low demands on tenants and recognizes individuals' rights as tenants is essential when contemplating housing operated by treatment providers. Providing social services only to the degree that a particular individual requests services is preferable to the "all or nothing" method typical of some treatment providers. *B* needs a housing program that accepts that she may never stop using drugs or alcohol and emphasizes a harm reduction model that will improve her quality of life.

C. Redefining "Disability" and What it Means to Be "Equal" in the Context of Housing

Anti-discrimination laws for individuals with disabilities continue to focus on the individual as the locus of needed change rather than society overall.⁹⁴ The societal expectation that individuals with severe mental disabilities conform their conduct to demonstrate their worthiness for certain benefits, like housing, disregards the manner in which society places barriers in the way of individuals with disabilities. A framework for true integration of people with mental disabilities requires a departure from the notion of equality with which courts have been operating.⁹⁵ True equality entails more than simply treating individuals

⁹³ "With decreasing public and private funds and sagging public sympathy, private and public shelter and service providers increasingly focus their efforts on those groups that are easiest to assist." Apfel, *supra* note 75, at 551 (footnotes omitted).

⁹⁴ Brzuzy, *supra* note 85, at 82.

⁹⁵ Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535 (2001). Mayerson and Yee discuss the formal equality model and genuine model of equality. *Id.* at 538. The formal equality model treats similarly situated people in the same manner. *Id.* Clearly, this presents difficulty for individuals with disabilities because they are not similarly situated to the greater population. On the other hand, the model of genuine equality treats people as equals. *Id.* "The concept of [genuine] equality acknowledges the importance of individual and group differences and takes into account both personal and environmental barriers that inhibit societal participation. Therefore, barriers that deny or limit an individual's right to be an equal member of society should be eliminated." *Id.* Professor Colker has articulated two conflicting principles underlying equal protection in the context of race and gender, which may prove useful in the context of disability:

Under the anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach

with mental disabilities in the same manner as people without disabilities. To be more responsive to the needs of individuals with mental disabilities requires a different approach in defining disability.⁹⁶ Disabilities only become disabling when society refuses to account for differences in human abilities. Rather than conforming the individual, in effect fixing the defective person,⁹⁷ society, and housing in particular, should be designed to reflect the diversity of human needs.⁹⁸ Society can be, and has been, more receptive to incorporating differences.⁹⁹

The concept of reasonable accommodation seems to support the idea that society must respond to divergent individual needs, but too often individuals like *B* are viewed in isolation from the larger community, which fails to accommodate the needs of all of its citizens. Rather than focusing on why *B* is not suitable for housing, we must ask ourselves why housing that is suitable for *B* and individuals like her is not available.

seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities.

Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-07 (1986).

⁹⁶ Several scholars have discussed different conceptualizations of disability. Brzuzy has articulated four models of disability. Brzuzy, *supra* note 85, at 85. The traditional model views individuals with disabilities with extraordinary powers, "as evil spirits or divine, taking the roles of a shaman, or high priest or priestess." *Id.* at 86. A medical model of disability, the most prevalent view, sees only the functional limitations of a particular individual. *Id.* at 86. "The economic/work limitations model views disability in terms of one's ability to function in a paid-for-work capacity." *Id.* at 87. According to Brzuzy, the preferable formulation of disability is the socio-political model. *Id.* "The socio-political model argues that disability is a function of social, economic, and political forces working together. Disability is the result of interactions between persons and their environment." *Id.* Drimmer criticizes what he terms the medical model and the social pathology model of disability for their emphasis on "disability as a defect that the individual must seek to remedy with the help of experts." Drimmer, *supra* note 5, at 1348. Drimmer advocates conceptualizing disability in terms of a civil rights model. *Id.* at 1355-59. "[T]he [civil rights] model recognizes physical and mental differences, it does not support the use of these differences to create hierarchical structures of superiority and inferiority upon which societal participation is premised." *Id.* at 1357.

⁹⁷ Drimmer, *supra* note 5, at 1354; *see also* Brzuzy, *supra* note 85, at 81 ("Physical, cognitive, and emotional impairments are not regarded in our society as simply variations in human construction. Instead, such impairments are regarded as limiting and defective.").

⁹⁸ Brzuzy, *supra* note 85, at 82. "Persons with impairments are perceived and treated differently and are consequently excluded from the mainstream. Impairments become disabilities when societies create structures which limit people's opportunities and access to resources." *Id.* at 81.

⁹⁹ According to Brzuzy, as society became more complex and task-centered, the familiarity with disability diminished, resulting in a definition of "disability" that places responsibility for their inability to participate in society on those individuals with disabilities. *Id.* at 83-87.

V. CONCLUSION

People with severe and persistent mental disabilities have made substantial gains in the recognition of their rights. Although there is a degree of disagreement between mental health treatment providers and advocates for people with disabilities, deinstitutionalization is largely credited with decreasing the amount of money that states direct toward mental health treatment. Few would disagree with the notion that community treatment is far superior to institutionalizing people indefinitely, but in practice, laws designed to protect the civil rights of people with mental disabilities in the context of housing do too little to ensure the availability of housing, because of the failure to recognize the connection between discrimination based on financial status and discrimination based on disability. Until housing is available that better serves the needs of individuals with the most severe mental disabilities without infringing on the rights of those people it is designed to assist, individuals who are both homeless and severely mentally disabled remain in the position of having to choose between housing and exercising the right to refuse treatment. Eliminating this dilemma, by ensuring that individuals with severe mental disabilities have access to housing despite a refusal to engage in treatment, is necessary to eliminate homelessness among this population. Finally, we must recognize that a disability only becomes disabling when society is structured in a way that creates barriers and limits access for some individuals. Equality for people with mental disabilities can only be achieved when the focus of change is no longer simply the individual, but society overall.

